

June 20, 2005

BY HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

Re: Request for Declaratory Ruling
WT Docket No. 02-55, ET Docket Nos. 00-258 & 95-18

Dear Ms. Dortch:

Nextel Communications, Inc. ("Nextel"), the Association for Maximum Service Television, Inc. ("MSTV"), and the National Association of Broadcasters ("NAB") (collectively, the "Petitioners") hereby request a declaratory ruling, or, in the alternative, clarification, that:

(1) Nextel will receive credit in the 800 MHz Public Safety proceeding "true-up" process for funding the relocation of Broadcast Auxiliary Service ("BAS") operators licensed pursuant to applications filed after June 26, 2000 but before November 23, 2004, and

(2) BAS licensees will not be entitled to reimbursement for the cost of relocating incremental equipment purchased after November 22, 2004, except in certain circumstances as described below.

Clarification of these issues will help ensure BAS licensees are relocated within the ~~deadline established by the Commission and without disrupting their electronic~~ newsgathering ("ENG") activities.

I. Background

In its 800 MHz Public Safety proceeding, the Commission adopted a comprehensive solution to life-threatening interference to public safety systems in the 800 MHz band.¹ Under the Commission's decision, Nextel will fund the reconfiguration of the 800 MHz band and also contribute spectrum holdings in the 700 MHz and 800 MHz bands to improve public safety communications. To make Nextel whole for these

¹ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, 19 FCC Rcd 14969 (2004) ("R&O").

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financial and spectral contributions, the Commission has assigned replacement spectrum to Nextel in the 1910-1915/1990-1995 MHz band. The Commission valued this spectrum at \$4.86 billion, and required Nextel, in a "true-up" process that will occur at the end of the 800 MHz reconfiguration, to pay to the U.S. Treasury the difference between this amount and various credits it will receive for the costs it incurs to satisfy its obligations under the *R&O*.²

One of these obligations requires Nextel to clear BAS licensees from the 1990-2025 MHz band by relocating their facilities to operate in the new BAS band at 2025-2110 MHz.³ Nextel will receive credit in the true-up process for the costs it incurs in relocating BAS licensees.⁴ Nextel must complete the BAS relocation within 31.5 months after the effective date of the *R&O*, or by September 7, 2007.⁵ The Commission has stated that "BAS is a critical part of the broadcasting system by which emergency information and entertainment content is provided to the American public."⁶ The Commission has accordingly emphasized that "a primary goal [is] to ensure that the BAS transition causes the minimum possible disruption to BAS operations."⁷

II. Credit for Costs in Relocating Post-June 2000 BAS Licensees

In the *R&O*, the Commission established procedures and deadlines for Nextel to relocate BAS licensees, but otherwise generally retained the BAS relocation rules it had previously adopted in proceedings regarding the Mobile Satellite Service ("MSS").⁸

² *R&O* ¶¶ 297, 330.

³ BAS licensees currently operate on seven shared channels in the 1990-2110 MHz band; they will continue to operate on seven shared channels in the 2025-2110 MHz band, with the bandwidth of each channel reduced from 17-18 MHz under the current band plan to 12 MHz in the new band plan.

⁴ *R&O* ¶ 330.

⁵ *R&O* ¶ 353; Public Notice, "Commission Seeks Comment on Ex Parte Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding," 19 FCC Rcd 21492 (2004) (extending BAS relocation deadlines by 45 days). BAS spectrum in the 2 GHz band is used for both mobile and fixed operations and is also authorized for use by the Cable Television Relay Service ("CARS") and the Local Television Transmission Service ("LTTS"). See *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by Mobile-Satellite Service*, Third Report and Order and Third Memorandum Opinion and Order, 18 FCC Rcd 23638, ¶ 1 n. 1 (2003) ("*Third MSS R&O*"). This filing refers to BAS, CARS, and LTTS collectively as "BAS."

⁶ *R&O* ¶ 250.

⁷ See *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by Mobile-Satellite Service*, 15 FCC Rcd 12315, ¶ 42 (2000) ("*Second MSS R&O*").

⁸ *R&O* ¶ 250.

Under these rules, BAS facilities licensed pursuant to initial applications filed prior to June 27, 2000 are entitled to reimbursement by MSS licensees that initiate BAS relocation.⁹ Initial applications filed on or after that date have been licensed on a secondary basis and, therefore, are not entitled to reimbursement by MSS licensees.

As stated above, the Commission established two overriding public interest objectives in adopting the Nextel – BAS relocation plan: (1) complete BAS relocation by September 7, 2007, and (2) minimize disruption to BAS operations. Petitioners believe, however, that it will not be possible to achieve these goals if Nextel does not fund the relocation costs of *all* BAS operators licensed prior to the Commission's decision in the 800 MHz Public Safety proceeding. As explained below, funding the relocation costs of all such licensees, including those licensed after June 27, 2000, will enable the careful coordination that will be required to ensure a timely and smooth BAS relocation. Towards this end, Nextel is willing to negotiate frequency relocation agreements that will fund the relocation costs of these post-June 2000 licensees, provided that they were licensed pursuant to initial applications filed on or before November 22, 2004 (the Federal Register publication date of the *R&O*), and provided that Nextel receives credit for such additional costs in the 800 MHz true-up process. Nextel, MSTV, and NAB believe granting Nextel such a credit will serve the public interest in the unique circumstances presented here.

Dozens of BAS licensees were licensed pursuant to applications filed on or after June 27, 2000 but on or before November 22, 2004 ("post-June 2000 licensees"). These licensees are located in various markets throughout the country. They include small licensees with limited resources, as well as licensees that acquired BAS facilities as part of initiating news operations for the first time on their broadcast stations. For example, WTTW, a noncommercial broadcast television station in Chicago, received its BAS license after June 2000 and is using the license to support its ENG operations. Post-June 2000 licensees also include a significant number of Spanish language stations that are using their BAS facilities to provide local news coverage to their communities.

In relocating BAS licensees to the new BAS band plan, relocation of all licensees ~~in a market and relevant adjacent markets – including the post-June 2000 licensees –~~ within the same timeframe is critical. This is because BAS licensees use all seven BAS channels (both in the current and new band plans) on a shared basis. As the Commission has stated, "the integrated nature of BAS operations . . . makes isolated, link-by-link relocation infeasible."¹⁰ In addition, as the Commission has also recognized, BAS/ENG systems "often operate both within markets and across market boundaries."¹¹ A BAS

⁹ 47 C.F.R. § 2.106 Footnote NG 156; *MSS Second R&O* ¶ 59.

¹⁰ *R&O* ¶ 256. See also *Second MSS R&O* ¶ 19 ("BAS licensees are typically licensed to use all seven BAS channels, and channel usage is coordinated on a dynamic basis by frequency coordinators in a TV market.").

¹¹ *Second MSS R&O* ¶ 19.

licensee in Detroit, for example, may send a news reporter to provide live coverage of events in Lansing, Michigan, which is the state capital and located in a different market. The BAS relocation plan that Nextel developed with NAB and MSTV addresses these concerns by (1) carefully synchronizing each licensee's relocation according to a market-wide switch-over date to be agreed to by all BAS licensees in the market, and (2) relocating markets in clusters to prevent inter-market coordination and interference problems.¹²

By funding the relocation costs of post-June 2000 BAS licensees, Nextel will be able to implement this carefully coordinated relocation plan in accordance with the Commission's September 2007 relocation deadline and its directive to minimize disruption to incumbent licensees. Without this funding, however, post-June 2000 licensees will have no incentive to negotiate frequency relocation agreements with Nextel or agree to market-wide switch-over dates that will be essential to avoiding interference among BAS licensees. Left to their own devices, post-June 2000 licensees would need to raise the capital necessary to cover the significant costs of relocating to the new band plan. This would impose substantial burdens on licensees, many of which are small and operate under limited budgets. For example, WTTW, the noncommercial station in Chicago, will need to spend approximately \$285,000 to modify and replace its current BAS equipment to operate on the new band plan.¹³ Nextel has been informed by station management that the station will have difficulty raising such funds, especially as it struggles to finance the conversion of the station's broadcasting facilities to digital television. Many other post-June 2000 licensees will face similar challenges. These challenges would either create extensive delays in relocating their systems to the new band plan or possibly prevent such relocation altogether.

The Commission may be confronted with three possible scenarios if it does not grant the relief requested herein, each of which would seriously undermine the Commission's public interest objectives: (1) Nextel and BAS licensees could postpone a market's switch-over to the new band plan to give post-June 2000 licensees in the market time to fund and implement their own relocation, which will likely delay BAS relocation beyond the Commission's September 2007 deadline; (2) Nextel and BAS licensees could forego a coordinated, market-wide switch-over approach, so that post-June 2000 licensees continue operating on the old BAS band plan while all other licensees operate on the new band plan, which will cause serious interference among licensees within the

¹² See Nextel BAS Relocation Schedule and Implementation Plan at 11 (filed April 6, 2005).

¹³ This estimate is based on Nextel's discussions with WTTW station management and information provided by manufacturers regarding the cost of replacement equipment. At the time it initiated its BAS operations, WTTW was unable to purchase BAS equipment capable of operating on both the current and new BAS band plans; in fact, it has only been within the past few months that broadcasters could acquire equipment that can operate on the new band plan. In addition, it appears that in many cases it will be less expensive to acquire new equipment to operate on the new band plan than to attempt to modify a licensee's existing equipment.

market and in adjacent markets; or (3) post-June 2000 licensees could simply shut down their BAS operations, which will prevent them from providing live news and emergency information that greatly benefits the public. None of these alternatives would be acceptable to the American public. Congressmen Upton and Dingell have emphasized that the Commission's BAS relocation and compensation procedures "should not jeopardize the ability of local stations to fulfill their primary role – to provide live local coverage of news events."¹⁴

Nextel, NAB, and MSTV respectfully submit that funding the relocation costs of post-June 2000 licensees will promote the Commission's objectives of avoiding undue disruption to broadcasters' ENG capabilities and completing BAS relocation by September 2007. It would therefore serve the public interest for the Commission to grant a credit to Nextel in the 800 MHz true-up process for these additional costs. Post-June 2000 licensees represent only approximately 5.5% of all BAS licensees that will be relocated, and the additional credit Nextel would receive for the costs of relocating these licensees would amount to only approximately 0.6% of the \$4.86 billion valuation of Nextel's 1.9 GHz replacement spectrum, and only about 4.5% of the estimated cost of relocating all BAS licensees. Even with this credit, Nextel will be undertaking additional risk to the extent the costs it incurs in carrying out its numerous obligations under the R&O exceed the value of the replacement spectrum it has been granted. While Nextel has accepted that risk, the public interest will be served by allowing Nextel to receive credit for these costs.

Funding post-June 2000 licensee relocation costs (and affording Nextel a credit for these costs) will also promote a more equitable relocation process. At the time the Commission adopted its MSS – BAS relocation orders, the expectation was that post-June 2000 licensees would be in a position to take into account the new BAS band in planning and acquiring equipment for their BAS facilities. They have faced numerous obstacles in doing so, however. No MSS licensee has initiated BAS relocation in the five years since the June 2000 cut-off date was established, with a number of MSS operators going out of business. The Commission has made significant modifications to its BAS relocation plan, moving from a multi-phase BAS band plan adopted in 2000,¹⁵ to a single-phase, market-staggered approach in 2003,¹⁶ to a plan based on a joint Nextel – broadcast industry proposal in 2004. These circumstances have created significant delays and uncertainties, and manufacturers have had little incentive until recently to produce BAS equipment that can operate on the new BAS band plan. Post-June 2000 licensees consequently now find themselves with BAS equipment that in many cases was acquired many months ago and which, because of events largely beyond their control, cannot be converted to the new band plan without a substantial investment. The proposed

¹⁴ Letter from Honorable Fred Upton and Honorable John D. Dingell to FCC Chairman Powell, at 3 (March 23, 2004).

¹⁵ MSS Second R&O ¶¶ 28-34.

¹⁶ MSS Third R&O ¶¶ 29-44.

declaratory ruling or clarification would allow these parties to avoid this potentially inequitable burden.

The proposed declaratory ruling or clarification will not harm MSS licensees. Nextel, MSTV, and NAB are not proposing any change to the June 27, 2000 reimbursement eligibility cut-off date in the context of MSS – BAS relocation. In addition, Nextel will not seek reimbursement from MSS licensees for any additional costs it incurs for relocating post-June 2000 BAS licensees. MSS licensees will in fact benefit from the requested ruling, as it will help ensure that the 1990-2025 MHz band is cleared in an expeditious manner for Nextel and MSS licensees alike.

III. Cut-Off Date for New Equipment Purchases

Petitioners also request declaratory ruling or clarification that Nextel is not required to reimburse BAS licensees for the costs of “incremental” equipment, (*i.e.*, equipment which is purchased to supplement existing facilities) which was acquired after November 22, 2004, with the following exception: Nextel would reimburse BAS licensees (and receive credit in the true-up process) for costs of equipment which a BAS licensee acquired after November 22, 2004 but prior to the licensee’s relocation date, provided (1) such acquisition was necessary to replace or repair malfunctioning equipment, (2) the licensee notifies Nextel when the need to replace or repair equipment arises, and (3) the licensee returns the replaced equipment to Nextel.

Licensees eligible for reimbursement are entitled to receive “comparable facilities” from Nextel.¹⁷ Determining the scope of this requirement in the context of BAS is somewhat difficult. Unlike fixed service licenses, a BAS license may cover multiple, unspecified pieces of equipment, including equipment that may be acquired after the issuance of the license. Nextel, MSTV, and NAB believe a reasonable interpretation of the comparable facilities requirement in the context of BAS relocation would preclude reimbursement for the costs of incremental equipment acquired after November 22, 2004, subject to the exception described above. After this date, all BAS licensees were on notice that Nextel would be relocating BAS licensees according to the schedule set forth in the *R&O*, and therefore were in a position to plan their incremental BAS equipment purchases accordingly without undue disruption to their ENG operations.

The Petitioners request a declaratory ruling or clarification that this interpretation is a reasonable construction of the Commission’s comparable facilities standard. Issuance of such a ruling will give Nextel and BAS licensees certainty regarding the universe of equipment that is covered by Nextel’s relocation obligations. Providing such certainty is warranted by the unique circumstances presented by the Nextel – BAS relocation process. First, Nextel is subject to an aggressive deadline to complete the relocation process; clarifying a reimbursement cut-off date for new equipment at the start of the process will expedite negotiations with individual BAS licensees and thus help ensure that BAS relocation is completed by the Commission’s September 2007 deadline.

¹⁷ *R&O* ¶ 252.

Second, by providing certainty regarding the scope of Nextel's relocation obligations, the credits Nextel will be entitled to under the 800 MHz true-up process will be clarified prior to Nextel's expenditure of BAS relocation funds.¹⁸

A copy of this letter has been filed in the public record of the above-reference proceedings.

Lawrence R. Krevor/SJB
Lawrence R. Krevor
Vice President – Government Affairs
Nextel Communications, Inc.
2001 Edmund Halley Drive
Reston, Virginia 20191
(703) 433-4141

Marsha J. McBride/SJB
Marsha J. McBride
Executive Vice President
Legal and Regulatory Affairs
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Respectfully submitted,
David Donovan/SJB
David Donovan
President
Association for Maximum Service
Television, Inc.
4100 Wisconsin Avenue, N.W.
Washington, D.C. 20016
(202) 966-1956

June 20, 2005

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|-----|-------------------|-----------------|-------------------|
| cc: | Sam Feder | Bruce Franca | Geraldine Matisse |
| | Donna Gregg | Michael Wilhelm | Priya Shrinivasan |
| | Roberto Mussenden | Brian Marengo | Roy Stewart |
| | Deborah Klein | Rick Chessen | Keith Larson |
| | John Wong | Wayne McKee | Sarah Mahmood |
| | Paul Gunia | John Gabrysch | |

¹⁸ The Petitioners have discussed with Commission staff another issue regarding the appropriate interpretation of the comparable facilities standard. Some BAS licensees lease equipment or retain services from independent vendors to support the licensee's BAS facilities. Such vendors may, for example, lease ENG helicopters to a BAS licensee or provide freelance breaking news reports to the licensee. It will consequently be necessary to modify or replace equipment owned by such independent vendors so that this equipment can operate on the new band plan and continue to support broadcasters' ENG operations. Consistent with guidance it has received from the Commission staff, Nextel will cover the relocation costs of such vendors to the extent that they have an existing contractual relationship with a BAS licensee and the licensee confirms to Nextel that funding the vendor's relocation costs is necessary to provide the licensee comparable facilities.